

Memorandum



Economic Development

DATE: November 16, 2001

TO: Mayor and City Council

FROM: Chris Anaradian, Rio Salado Manager (480-858-2204)

THROUGH: Jan Schaefer, Economic Development Director (480-350-8036)

SUBJECT: **Rio Salado Habitat Restoration Project Agreement with the US Army Corps of Engineers**

This month marks a milestone in the city of Tempe's efforts to partner with the US Army Corps of Engineers (Corps) in the construction of three habitat restoration projects along Tempe's Rio Salado and Indian Bend Wash channels.

Since December of 1995, the cities of Tempe and Phoenix have been working with the Corps on investigations, feasibility studies, and concept designs for Salt River habitat restoration projects. The Corps has recently secured \$20M in funding and is ready to proceed with final designs and go to construction in both Tempe and Phoenix, as soon as project plans from either city are completed and ready for bidding. For the Tempe project to proceed at this time, the City of Tempe and The Corps must enter into a contract that establishes roles and responsibilities during the life of the project. This contract is called the Project Cooperation Agreement (PCA).

The PCA is a relatively new type of agreement developed by the Corps to specifically deal with these types of habitat restoration projects. An almost identical agreement has already been signed by the city of Phoenix that has allowed their habitat work to proceed along a 5-mile corridor of the Salt River. The PCA establishes the scope of the project work, and a 5-year monitoring program for each habitat project. The Corps will contract for design services, manage construction, and consult with Tempe as these projects move forward. The Corps participates in 50% of project design costs and 65% of project construction costs. The Corps will also participate in 50% of the construction cost of recreational amenities built to support the projects (shade structures, restrooms, etc.).

Tempe's restoration project is actually sub-divided into three areas that will be designed and restored as three separate projects. The first is the Indian Bend Wash reach. To adequately prepare this project site, Tempe will be responsible for establishment of the project water supply, and for maintenance of the 100-year flood event capacity of the wash. Planned construction of a dedicated well adjacent to the project site and a seat wall along some portions of the banks of the wash will address these requirements and be designed into the overall project plans.

Total project costs for the three separate areas are currently estimated at near \$6.5M. Tempe's share of these costs is estimated to be \$2.4M. As of today, the city has already invested an additional \$422K in the project through the 1995 Feasibility Cost Sharing Agreement, entered into by Tempe, Phoenix and the Corps to conduct investigations, feasibility studies, and produce concept designs. Because the city has currently set aside \$1.1M to participate in the balance of our partnership with the Corps, **no additional funding is required to proceed at this time** for the completion of the Indian Bend Wash reach. Also, when this project moves forward, Tempe will receive \$344K of credit for work already performed on the Town Lake bypass pipeline, recently installed just above the upstream dam. Staff anticipates submitting a

request for the remaining \$956K of Tempe's obligation under this PCA during the 2003-04 CIP budgeting process.

Please note that the PCA obligates Tempe to provide project property and needed water quantities for the project. Tempe is also obligated to manage each completed area after construction and actively maintain the habitats, preventing encroachments or a change in use of these lands. Future maintenance and operation costs of these project areas are currently unknown, but will be the obligation of the city once this PCA is entered into and the projects completed.

For your review, I have attached a draft copy of the PCA and available images of the Indian Bend Wash reach with examples of proposed restoration plantings.

Staff recommendation: The restoration of this riparian habitat is an important element to the overall Rio Salado area. With the help of the Army Corps of Engineers, this project is within reach. Staff recommends proceeding with the execution of the Project Cooperation Agreement. If Council agrees, the PCA will be placed on the December 13, 2001 Consent Agenda for your approval.

PROJECT COOPERATION AGREEMENT
BETWEEN
THE DEPARTMENT OF THE ARMY
AND
CITY OF TEMPE
~~CITY OF PHOENIX~~
FOR CONSTRUCTION OF THE
RIO SALADO (SALT RIVER), ~~PHOENIX REACH~~ TEMPE REACH, ARIZONA

THIS AGREEMENT is entered into this _____ day of _____, 20__, by and between the Department of the Army (hereinafter the "Government"), represented by the ~~Deputy Assistant Secretary of the Army (Management and Budget), Office of the Assistant Secretary of the Army (Civil Works), and the City of Phoenix~~ City of Tempe (hereinafter the "Non-Federal Sponsor") represented by the Assistant City Manager.

WITNESSETH, THAT:

WHEREAS, construction of the Rio Salado (Salt River) Phoenix and Tempe, Arizona at ~~Phoenix~~ Tempe, Arizona (hereinafter the "Authorized Project") was authorized by Section 101(a)(4) of the Water Resources Development Act 1999, Public Law 106-53;

WHEREAS, the Government and the Non-Federal Sponsor desire to enter into a Project Cooperation Agreement (hereinafter the "Agreement") for construction of the ~~Phoenix~~ Tempe Reach of the Authorized Project (hereinafter the "Project", as defined in Article I.A. of this Agreement);

WHEREAS, the Government and the Non-Federal entered into an agreement (hereinafter the "Credit Agreement") on ~~June 1, 2000~~ August 9, 2000 which provides that, subject to the availability of appropriations and to other limitations set forth in the Credit Agreement, the Government shall credit the Non-Federal Sponsor for work performed on the Project, in accordance with the Credit Agreement (hereinafter the "Credit Agreement Work", as defined in Article I.R. of this Agreement), towards the non-Federal share of the Project;

WHEREAS, Section 103(c) of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost-sharing requirements applicable to the Project;

WHEREAS, Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended, and Section 103 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, provide that the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal sponsor has entered into a written agreement to furnish its required cooperation for the project or separable element;

WHEREAS, Section 902 of Public Law 99-662 establishes the maximum amount of costs for the Authorized Project and sets forth procedures for adjusting such maximum amount;

WHEREAS, Section 102 of the Energy and Water Development Appropriations Act, 2000, Public Law 106-60, provides that credits and reimbursements afforded under certain general authorities and under project specific authority, such as Section 101(a)(4) of the Water Resources Development Act of 1999, Public Law 106-53, shall not exceed \$10,000,000 per project in each fiscal year, nor shall they exceed \$50,000,000 for all applicable projects in each fiscal year; and

WHEREAS, the Government and Non-Federal Sponsor have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing of the construction of the Project in accordance with the terms of this Agreement.

NOW, THEREFORE, the Government and the Non-Federal Sponsor agree as follows:

ARTICLE I -DEFINITIONS AND GENERAL PROVISIONS

For purposes of this Agreement:

A. The term "Project" shall mean restoration of the ecosystem function and values to a 1.3 five (5) miles portions of the Indian Bend Wash and a mile of the Salt River in Phoenix Tempe, Arizona and creation of recreational features consisting of trails, shelters, restrooms, signage, parking, and associated features along the five (5) mile portion of the Salt River and Indian Bend Wash in Phoenix Tempe, Arizona as generally described in the Feasibility Report and Environmental Impact Statement, Rio Salado, Salt River, Arizona, dated April 1998, revised June 1998, as modified by the Report of the Chief of Engineers, dated August 20, 1998, as modified by the Supplemental Information Report, dated January 2000 (hereinafter the "Decision Documents").

B. The term "ecosystem restoration features" shall mean the water supply and infrastructures features consisting of extraction wells, pumps and well-head treatment and automated distribution system necessary to re-establish and support native vegetation and wildlife habitat that consist of approximately 200 30 acres of mesquite habitat, 90 20 acres of cottonwood/willow habitat, 37 16 acres of wetland marsh, 43 50 acres of aquatic strand/scrub habitat, 32 ?? acres upper sonoran habitat and 123 34 acres of open edges; The recommended project would restore native plant communities and federally listed threatened and endangered species habitat, thereby returning the river to a more natural condition. ~~construction of five miles of low flow channel approximately two hundred feet wide and ten feet deep; construction of four grade control structures, thirty six guide dike structures and protective structures for bridged crossings to contain moderate streamflow events; and~~ monitoring and adaptive management all as generally described in the Decision Documents.

C. The term “recreation features” shall mean parking lots, information kiosk, ~~portions of the Visitor Center/Interpretive Center,~~ overlooks with railing, shade structures, ~~bridges,~~ restroom facility, trails, retaining walls, ~~staging areas,~~ interpretive signage/displays, landscaping, irrigation system, drinking fountains, benches, and service and area lights for the parking associated with this day-use area all as generally described in the Decision Documents.

D. The term "total project costs" shall mean all costs incurred by the Non-Federal Sponsor and the Government in accordance with the terms of this Agreement directly related to construction of the Project. Subject to the provisions of this Agreement, the term shall include, but is not necessarily limited to: continuing planning and engineering costs incurred after October 1, 1985; advanced engineering and design costs; preconstruction engineering and design costs; engineering and design costs during construction; the costs of monitoring as defined in paragraph O. of this Article; the costs of adaptive management as defined in paragraph P. of this Article; the costs of investigations to identify the existence and extent of hazardous substances in accordance with Article XV.A. of this Agreement; costs of historic preservation activities in accordance with Article XVIII.A. of this Agreement; actual construction costs, including costs incurred for the Credit Agreement Work as defined in paragraph R. of this Article for which the Government affords credit in accordance with Articles II.D.2. and II.E.2. of this Agreement to the extent they do not duplicate costs otherwise included in this paragraph; supervision and administration costs; costs of participation in the Project Coordination Team in accordance with Article V of this Agreement; costs of contract dispute settlements or awards; the value of lands, easements, rights-of-way, relocations, and suitable borrow and dredged or excavated material disposal areas for which the Government affords credit in accordance with Article IV of this Agreement; and costs of audit in accordance with Article X of this Agreement. The term does not include any costs for operation, maintenance, repair, replacement, or rehabilitation; any costs due to betterments; any Costs for Water as defined in Article I.Q. of this Agreement; or any costs of dispute resolution under Article VII of this Agreement.

E. The term “total project ecosystem restoration costs” shall mean that portion of the total project costs that the Government assigns to the ecosystem restoration features.

F. The term “total project recreation costs” shall mean that portion of the total project costs that the Government assigns to the recreation features.

G. The term "financial obligation for construction" shall mean a financial obligation of the Government or a financial obligation of the Non-Federal Sponsor for Credit Agreement Work, other than an obligation pertaining to the provision of lands, easements, rights-of-way, relocations, and borrow and dredged or excavated material disposal areas, that results or would result in a cost that is or would be included in total project costs.

H. The term "non-Federal proportionate share" shall mean the ratio of the Non-Federal Sponsor's total cash contribution required in accordance with Articles II.D. and II.E. of this Agreement to total financial obligations for construction, as projected by the Government.

I. The term "period of construction" shall mean the time from the date the Government first notifies the Non-Federal Sponsor in writing, in accordance with Article VI.B. of this Agreement, of the scheduled date for issuance of the solicitation for the first construction contract to the date that the U.S. Army Engineer for the Los Angeles District (hereinafter the "District Engineer") notifies the Non-Federal Sponsor in writing of the Government's determination that construction of the Project is complete, including the monitoring and adaptive management as defined in Articles I.O. and I.P. of this Agreement.

J. The term "highway" shall mean any public highway, roadway, street, or way, including any bridge thereof.

K. The term "relocation" shall mean providing a functionally equivalent facility to the owner of an existing utility, cemetery, highway or other public facility, or railroad when such action is authorized in accordance with applicable legal principles of just compensation or as otherwise provided in the authorizing legislation for the Project or any report referenced therein. Providing a functionally equivalent facility may take the form of alteration, lowering, raising, or replacement and attendant removal of the affected facility or part thereof.

L. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

M. The term "functional portion of the Project" shall mean a portion of the Project that is suitable for tender to the Non-Federal Sponsor to operate and maintain in advance of completion of the entire Project. For a portion of the Project to be suitable for tender, the District Engineer must notify the Non-Federal Sponsor in writing of the Government's determination that the portion of the Project is complete and can function independently and for a useful purpose, although the balance of the Project is not complete.

N. The term "betterment" shall mean a change in the design and construction of an element of the Project resulting from the application of standards that the Government determines exceed those that the Government would otherwise apply for accomplishing the design and construction of that element.

O. The term "monitoring" shall mean monitoring of the ecosystem restoration features during the first 5 years following construction of the ecosystem restoration features, in order to assure that the ecosystem restoration features continue to function properly after construction. This term shall include, but is not necessarily limited to: monitoring the success of vegetation/habitat establishment in the ecosystem restoration features area; monitoring the restored aquatic resources associated with the ecosystem restoration features; monitoring wildlife resources associated with the restored habitats; and monitoring and early identification of the establishment of wildlife that has the potential to become a hazard to aviation safety. Monitoring results shall be compared to success criteria identified for the ecosystem restoration features so as to determine if adaptive management measures are necessary. As of the effective date of this Agreement, the

costs of the monitoring are projected to be ~~\$865,200~~ \$65,300 and shall not exceed 1 percent of the total project ecosystem restoration costs. The monitoring may be performed concurrently with the Non-Federal Sponsor's responsibilities for operation, maintenance, repair, replacement, and rehabilitation under Articles II.C. and VIII of this Agreement.

P. The term "adaptive management" shall mean changes made to the ecosystem restoration features based on monitoring results and deemed necessary to obtain the ecosystem restoration features objectives. Adaptive management may include adjustments for unforeseen circumstances and changes to structures or their operations or management techniques and shall be undertaken if the Government, after consultation with the Non-Federal Sponsor, determines adjustments are necessary to obtain the ecosystem restoration features objectives. As of the effective date of this Agreement, the costs of adaptive management are projected to be ~~\$2,571,485~~ \$193,941 and shall not exceed 3 percent of the total project ecosystem restoration costs.

Q. The term "Costs of Water" shall mean all costs incurred by the Non-Federal Sponsor, in accordance with Article II.J. of this Agreement, to acquire, secure and maintain the quantity of water that the Government determines is necessary for the construction, operation, and maintenance of the Project. As of the effective date of this Agreement, the quantity of water that is estimated to be continually necessary for construction, operation, and maintenance of the Project is estimated to be ~~5.82~~ 1.82 million gallons per day.

R. The term "Credit Agreement Work" shall mean work performed by the Non-Federal Sponsor in accordance with the Credit Agreement and includes but is not limited to contracting with the appropriate party for design and construction of the by-pass pump and pipeline features ~~for the propagation of plant materials for the project and the construction of five (5) miles of low flow channel approximately two hundred feet wide and ten feet deep, four grade control structures, thirty six guide dike structures and protective structures for bridged crossings within the Project as generally described in the Decision Documents.~~

ARTICLE II -OBLIGATIONS OF THE GOVERNMENT AND THE NON-FEDERAL SPONSOR

A. The Government, subject to receiving funds appropriated by the Congress of the United States (hereinafter, the "Congress") and using those funds and funds provided by the Non-Federal Sponsor, shall expeditiously construct the Project, applying those procedures usually applied to Federal projects, pursuant to Federal laws, regulations, and policies.

1. The Government shall afford the Non-Federal Sponsor the opportunity to review and comment on the solicitations for all contracts, including relevant plans and specifications, prior to the Government's issuance of such solicitations. The Government shall not issue the solicitation for the first construction contract until the Non-Federal Sponsor has confirmed in writing its willingness to proceed with the Project. To the extent possible, the Government shall afford the Non-Federal Sponsor the opportunity to review

and comment on all contract modifications, including change orders, prior to the issuance to the contractor of a Notice to Proceed. In any instance where providing the Non-Federal Sponsor with notification of a contract modification or change order is not possible prior to issuance of the Notice to Proceed, the Government shall provide such notification in writing at the earliest date possible. To the extent possible, the Government also shall afford the Non-Federal Sponsor the opportunity to review and comment on all contract claims prior to resolution thereof. The Government shall consider in good faith the comments of the Non-Federal Sponsor, but the contents of solicitations, award of contracts, execution of contract modifications, issuance of change orders, resolution of contract claims, and performance of all work on the Project (whether the work is performed under contract or by Government personnel), shall be exclusively within the control of the Government.

2. Throughout the period of construction, the District Engineer shall furnish the Non-Federal Sponsor with a copy of the Government's Written Notice of Acceptance of Completed Work for each contract for the Project.

B. The Non-Federal Sponsor may request the Government to accomplish betterments. Such requests shall be in writing and shall describe the betterments requested to be accomplished. If the Government in its sole discretion elects to accomplish the requested betterments or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs due to the requested betterments and shall pay all such costs in accordance with Article VI.C. of this Agreement.

C. When the District Engineer determines that the entire Project is complete or that a portion of the Project has become a functional portion of the Project, the District Engineer shall so notify the Non-Federal Sponsor in writing and furnish the Non-Federal Sponsor with an Operation, Maintenance, Repair, Replacement, and Rehabilitation Manual (hereinafter the "OMRR&R Manual") and with copies of all of the Government's Written Notices of Acceptance of Completed Work for all contracts for the Project or the functional portion of the Project that have not been provided previously. Upon such notification, the Non-Federal Sponsor shall operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project and the hydraulic integrity of the system, along with any required long-term dredged or excavated material disposal areas, at no cost to the Government, in accordance with Article VIII of this Agreement.

D. The Non-Federal Sponsor shall contribute 35 percent of the total project ecosystem restoration costs in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the Non-Federal Sponsor must provide for the construction, operation, and maintenance of the ecosystem restoration features, and shall perform or ensure performance of all relocations that the

Government determines to be necessary for the construction, operation, and maintenance of the ecosystem restoration features.

2. As authorized by Section 101(a)(4) of Public Law 106-53, the Government may afford credit for the Credit Agreement Work. The affording of such credit shall be subject to a technical review by the Government to verify that the credited work was accomplished in a satisfactory manner and in accordance with the limitations contained in this Agreement. To afford any such credit, the Government, as further specified in Article VI.B. of this Agreement, shall apply the actual amount of credit for the Credit Agreement Work assigned, by the Government, to ecosystem restoration features toward the cash contribution required by paragraph D.3. of this Article. The actual amount of credit shall not exceed the Non-Federal Sponsor's actual costs attributable to the Credit Agreement Work or the cost had the Government performed the Credit Agreement Work, whichever is the lesser. The actual amount of credit shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. If the actual amount of credit exceeds the cash contribution required by paragraph D.3. of this Article, the Government, subject to the availability of funds, may, on behalf of the Non-Federal Sponsor, provide ecosystem restoration features lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas, or perform ecosystem restoration features relocations, equal in value to such excess credit amount. As an alternative, and in its sole discretion, the Government may, subject to the availability of funds, reimburse the Non-Federal Sponsor in an amount equal to such excess credit amount.

3. If the Government projects that the value of the Non-Federal Sponsor's contributions under paragraphs D.1. and D.2. of this Article and Articles V, X, XV.A., XVIII.A., and XVIII.D. of this Agreement will be less than 35 percent of total project ecosystem restoration costs, the Non-Federal Sponsor shall provide an additional cash contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to make the Non-Federal Sponsor's total contribution equal to 35 percent of total project ecosystem restoration costs.

4. If the Government determines that the value of the Non-Federal Sponsor's contributions provided under paragraphs D.1 and D.2. of this Article and Articles V, X, XV.A., XVIII.A., and XVIII.D. of this Agreement has exceeded 35 percent of the total project ecosystem restoration costs, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for any such value in excess of 35 percent of the total project ecosystem restoration costs. After such a determination, the Government, in its sole discretion, may provide any remaining ecosystem restoration features lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas and perform any remaining ecosystem restoration features relocations on behalf of the Non-Federal Sponsor.

E. The Non-Federal Sponsor shall contribute 50 percent of total project recreation costs in accordance with the provisions of this paragraph.

1. In accordance with Article III of this Agreement, the Non-Federal Sponsor

shall provide all lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Government determines the Non-Federal Sponsor must provide for the construction, operation, and maintenance of the recreation features, and shall perform or ensure performance of all relocations that the Government determines to be necessary for the construction, operation, and maintenance of the recreation features.

2. As authorized by Section 101(a)(4) of Public Law 106-53, the Government may afford credit for the Credit Agreement Work. The affording of such credit shall be subject to a technical review by the Government to verify that the credited work was accomplished in a satisfactory manner and in accordance with the limitations contained in this Agreement. To afford any such credit, the Government, as further specified in Article VI.B. of this Agreement, shall apply the actual amount of credit for the Credit Agreement Work assigned, by the Government, to recreation features of the Project toward the cash contribution required by paragraph E.3. of this Article. The actual amount of credit shall not exceed the Non-Federal Sponsor's actual costs attributable to the Credit Agreement Work or the cost had the Government performed the Credit Agreement Work, whichever is the lesser. The actual amount of credit shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. If the actual amount of credit exceeds the cash contribution required by paragraph E.3. of this Article, the Government, subject to the availability of funds, may, on behalf of the Non-Federal Sponsor, provide recreation features lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas, or perform restoration features relocations, equal in value to such excess credit amount. As an alternative, and in its sole discretion, the Government may, subject to the availability of funds, reimburse the Non-Federal Sponsor in an amount equal to such excess credit amount.

3. If the Government projects that the value of the Non-Federal Sponsor's contributions under paragraphs E.1. and E.2. of this Article and Articles V, X, XV.A., XVIII.B., and XVIII.D. of this Agreement will be less than 50 percent of total project recreation costs, the Non-Federal Sponsor shall provide an additional cash contribution, in accordance with Article VI.B. of this Agreement, in the amount necessary to make the Non-Federal Sponsor's total contribution equal to 50 percent of total project recreation costs.

4. If the Government determines that the value of the Non-Federal Sponsor's contributions provided under paragraphs E.1. and E.2. of this Article and Articles V, X, XV.A., XVIII.B., and XVIII.D. of this Agreement has exceeded 50 percent of total project recreation costs, the Government, subject to the availability of funds, shall reimburse the Non-Federal Sponsor for any such value in excess of 50 percent of total project recreation costs. After such a determination, the Government, in its sole discretion, may provide any remaining recreation features lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas and perform any remaining recreation features relocations on behalf of the Non-Federal Sponsor.

F. The Non-Federal Sponsor may request the Government to provide lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or perform relocations on behalf of the Non-Federal Sponsor. Such requests shall be

in writing and shall describe the services requested to be performed. If in its sole discretion the Government elects to perform the requested services or any portion thereof, it shall so notify the Non-Federal Sponsor in a writing that sets forth any applicable terms and conditions, which must be consistent with this Agreement. In the event of conflict between such a writing and this Agreement, this Agreement shall control. The Non-Federal Sponsor shall be solely responsible for all costs of the requested services and shall pay all such costs in accordance with Article VI.C. of this Agreement. Notwithstanding the provision of lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas or performance of relocations by the Government, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of cleanup and response in accordance with Article XV.C. of this Agreement.

G. The Government, in accordance with Federal laws, regulations, and policies, shall assign all costs included in total project costs to either total project ecosystem restoration costs or to total project recreation costs.

H. The Government shall perform a final accounting in accordance with Article VI.D. of this Agreement to determine the contributions provided by the Non-Federal Sponsor in accordance with paragraphs B., D., E., and F. of this Article and Articles V, X, XV.A., and XVIII of this Agreement and to determine whether the Non-Federal Sponsor has met its obligations under paragraphs B., D., E., and F. of this Article.

I. The Non-Federal Sponsor shall not use Federal funds to meet the Non-Federal Sponsor's share of total project costs under this Agreement unless the Federal granting agency verifies in writing that the expenditure of such funds is expressly authorized by statute.

J. Crediting and/or reimbursement is subject to satisfactory compliance with applicable federal labor laws covering non-Federal construction, including, but not limited to the Davis-Bacon Act (40 USC 276c et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq) and the Copeland Anti-Kickback Act (40 USC 276c). Crediting and/or reimbursement may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

~~K.~~ J. The Non-Federal Sponsor shall, for so long as the Project remains authorized, acquire, secure, and maintain the quantity of water that the Government determines is necessary for the construction, operation, and maintenance of the Project, at no cost to the Government.

~~L.~~ K. The Non-Federal Sponsor shall prevent future encroachments on Project lands, easements, and rights-of-way which might interfere with the proper functioning of the Project.

M. L. The Non-Federal Sponsor shall prevent future recreation features from significantly impacting or interfering with the intended functions of the ecosystem restoration features of the Project.

N.M. The Non-Federal Sponsor shall provide and maintain necessary access roads, parking areas, and other public use facilities, open and available to all on equal terms.

O.N. The Non-Federal Sponsor shall design and/or construct the low flow material and the propagation of plant material for the Project.

P.Θ. In addition to any other limitations contained in this Agreement, the affording and the amount of credit is subject to the following additional limitations.

1. Any reimbursement for the Credit Agreement Work performed by the Non-Federal Sponsor shall be dependent upon the appropriation of funds applicable thereto or funds available therefor.

2. No credit shall be given or reimbursement made unless and until the District Engineer has certified that the Credit Agreement Work subject to credit or reimbursement pursuant to this Agreement has been performed in accordance with this Agreement.

3. The amount of credit or reimbursement for which the Non-Federal Sponsor may be eligible pursuant to this Agreement is not subject to interest charges, nor is it subject to adjustment to reflect changes in price levels between the time the Credit Agreement Work is completed and the time that the credit or reimbursement is afforded.

4. The Non-Federal Sponsor shall obtain all applicable Federal, State and local permits required for the performance of the Credit Agreement Work and for operation, maintenance, repair, rehabilitation and replacement of the Credit Agreement Work.

5. Any contract awarded by the Non-Federal Sponsor for the Credit Agreement Work under this Agreement shall include provisions consistent with all applicable Federal laws and regulations.

6. The amount of credit or reimbursement that may be afforded the Non-Federal Sponsor for the Credit Agreement Work shall be subject to the applicable limitations contained in Section 102 of the Energy and Water Appropriations Act, 2000, Public Law 106-60.

ARTICLE III -LANDS, RELOCATIONS, DISPOSAL AREAS, AND PUBLIC LAW 91-646 COMPLIANCE

A. The Government, after consultation with the Non-Federal Sponsor, shall determine the lands, easements, and rights-of-way required for the construction, operation, and maintenance of the Project, including those required for relocations, borrow materials, and dredged or excavated material disposal. The Government shall indicate which of the required lands, easements, and rights-of-way are required for the ecosystem restoration

features and which are required for the recreation features. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of the lands, easements, and rights-of-way that the Government determines the Non-Federal Sponsor must provide, in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with acquisition of such lands, easements, and rights-of-way. Prior to the end of the period of construction, the Non-Federal Sponsor shall acquire all lands, easements, and rights-of-way set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each construction contract, the Non-Federal Sponsor shall provide the Government with authorization for entry to all lands, easements, and rights-of-way the Government determines the Non-Federal Sponsor must provide for that contract. For so long as the Project remains authorized, the Non-Federal Sponsor shall ensure that lands, easements, and rights-of-way that the Government determines to be required for the operation and maintenance of the Project and that were provided by the Non-Federal Sponsor are retained in public ownership for uses compatible with the authorized purposes of the Project.

B. The Government, after consultation with the Non-Federal Sponsor, shall determine the improvements required on lands, easements, and rights-of-way to enable the proper disposal of dredged or excavated material associated with the construction, operation, and maintenance of the Project. The Government shall indicate which of the required improvements are associated with the ecosystem restoration features and which are associated with the recreation features. Such improvements may include, but are not necessarily limited to, retaining dikes, wasteweirs, bulkheads, embankments, monitoring features, stilling basins, and de-watering pumps and pipes. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions of such improvements in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written notice to proceed with construction of such improvements. Prior to the end of the period of construction, the Non-Federal Sponsor shall provide all improvements set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government construction contract, the Non-Federal Sponsor shall prepare plans and specifications for all improvements the Government determines to be required for the proper disposal of dredged or excavated material under that contract, submit such plans and specifications to the Government for approval, and provide such improvements in accordance with the approved plans and specifications.

C. The Government, after consultation with the Non-Federal Sponsor, shall determine the relocations necessary for the construction, operation, and maintenance of the Project, including those necessary to enable the removal of borrow materials and the proper disposal of dredged or excavated material. The Government shall delineate which of the necessary relocations are necessary for the ecosystem restoration features and which are necessary for the recreation features. The Government in a timely manner shall provide the Non-Federal Sponsor with general written descriptions, including maps as appropriate, of such relocations in detail sufficient to enable the Non-Federal Sponsor to fulfill its obligations under this paragraph, and shall provide the Non-Federal Sponsor with a written

notice to proceed with such relocations. Prior to the end of the period of construction, the Non-Federal Sponsor shall perform or ensure the performance of all relocations as set forth in such descriptions. Furthermore, prior to issuance of the solicitation for each Government construction contract, the Non-Federal Sponsor shall prepare or ensure the preparation of plans and specifications for, and perform or ensure the performance of, all relocations the Government determines to be necessary for that contract.

D. The Non-Federal Sponsor in a timely manner shall provide the Government with such documents as are sufficient to enable the Government to determine the value of any contribution provided pursuant to paragraphs A., B., or C. of this Article. Upon receipt of such documents the Government, in accordance with Article IV of this Agreement and in a timely manner, shall determine the value of such contribution, include such value in total project costs, and afford credit for such value toward the Non-Federal Sponsor's share of total project costs.

E. The Non-Federal Sponsor shall comply with the applicable provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, as amended by Title IV of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), and the Uniform Regulations contained in 49 C.F.R. Part 24, in acquiring lands, easements, and rights-of-way required for the construction, operation, and maintenance of the Project, including those necessary for relocations, borrow materials, and dredged or excavated material disposal, and shall inform all affected persons of applicable benefits, policies, and procedures in connection with said Act.

ARTICLE IV -CREDIT FOR VALUE OF LANDS, RELOCATIONS, AND DISPOSAL AREAS

A. The Non-Federal Sponsor shall receive credit toward its share of total project ecosystem restoration costs for the value of the lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Non-Federal Sponsor must provide pursuant to Article III of this Agreement for the ecosystem restoration features, and for the value of the relocations that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III of this Agreement for the ecosystem restoration features. The Non-Federal Sponsor shall receive credit toward its share of total project recreation costs for the value of the lands, easements, rights-of-way, and suitable borrow and dredged or excavated material disposal areas that the Non-Federal Sponsor must provide pursuant to Article III of this Agreement for the recreation features, and for the value of the relocations that the Non-Federal Sponsor must perform or for which it must ensure performance pursuant to Article III of this Agreement for the recreation features. However, the Non-Federal Sponsor shall not receive credit for the value of any lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal areas that have been provided previously as an item of cooperation for another Federal project. The Non-Federal Sponsor also shall not receive credit for the value of lands, easements, rights-of-way, relocations, or borrow and dredged or excavated material disposal

areas to the extent that such items are provided using Federal funds unless the Federal granting agency verifies in writing that such credit is expressly authorized by statute.

B. For the sole purpose of affording credit in accordance with this Agreement, the value of lands, easements, and rights-of-way, including those necessary for relocations, borrow materials, and dredged or excavated material disposal, shall be the fair market value of the real property interests, plus certain incidental costs of acquiring those interests, as determined in accordance with the provisions of this paragraph.

1. Date of Valuation. The fair market value of lands, easements, or rights-of-way owned by the Non-Federal Sponsor on the effective date of this Agreement shall be the fair market value of such real property interests as of the date the Non-Federal Sponsor provides the Government with authorization for entry thereto. The fair market value of lands, easements, or rights-of-way acquired by the Non-Federal Sponsor after the effective date of this Agreement shall be the fair market value of such real property interests at the time the interests are acquired.

2. General Valuation Procedure. Except as provided in paragraph B.3. of this Article, the fair market value of lands, easements, or rights-of-way shall be determined in accordance with paragraph B.2.a. of this Article, unless thereafter a different amount is determined to represent fair market value in accordance with paragraph B.2.b. of this Article.

a. The Non-Federal Sponsor shall obtain, for each real property interest, an appraisal that is prepared by a qualified appraiser who is acceptable to the Non-Federal Sponsor and the Government. The appraisal must be prepared in accordance with the applicable rules of just compensation, as specified by the Government. The fair market value shall be the amount set forth in the Non-Federal Sponsor's appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's appraisal, the Non-Federal Sponsor may obtain a second appraisal, and the fair market value shall be the amount set forth in the Non-Federal Sponsor's second appraisal, if such appraisal is approved by the Government. In the event the Government does not approve the Non-Federal Sponsor's second appraisal, or the Non-Federal Sponsor chooses not to obtain a second appraisal, the Government shall obtain an appraisal, and the fair market value shall be the amount set forth in the Government's appraisal, if such appraisal is approved by the Non-Federal Sponsor. In the event the Non-Federal Sponsor does not approve the Government's appraisal, the Government, after consultation with the Non-Federal Sponsor, shall consider the Government's and the Non-Federal Sponsor's appraisals and determine an amount based thereon, which shall be deemed to be the fair market value.

b. Where the amount paid or proposed to be paid by the Non-Federal Sponsor for the real property interest exceeds the amount determined pursuant to paragraph B.2.a. of this Article, the Government, at the request of the Non-Federal Sponsor, shall consider all factors relevant to determining fair market value and, in its sole discretion, after consultation with the Non-Federal Sponsor, may approve in writing an amount greater than

the amount determined pursuant to paragraph B.2.a. of this Article, but not to exceed the amount actually paid or proposed to be paid. If the Government approves such an amount, the fair market value shall be the lesser of the approved amount or the amount paid by the Non-Federal Sponsor, but no less than the amount determined pursuant to paragraph B.2.a. of this Article.

3. Eminent Domain Valuation Procedure. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted after the effective date of this Agreement, the Non-Federal Sponsor shall, prior to instituting such proceedings, submit to the Government notification in writing of its intent to institute such proceedings and an appraisal of the specific real property interests to be acquired in such proceedings. The Government shall have 60 days after receipt of such a notice and appraisal within which to review the appraisal, if not previously approved by the Government in writing.

a. If the Government previously has approved the appraisal in writing, or if the Government provides written approval of, or takes no action on, the appraisal within such 60-day period, the Non-Federal Sponsor shall use the amount set forth in such appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

b. If the Government provides written disapproval of the appraisal, including the reasons for disapproval, within such 60-day period, the Government and the Non-Federal Sponsor shall consult in good faith to promptly resolve the issues or areas of disagreement that are identified in the Government's written disapproval. If, after such good faith consultation, the Government and the Non-Federal Sponsor agree as to an appropriate amount, then the Non-Federal Sponsor shall use that amount as the estimate of just compensation for the purpose of instituting the eminent domain proceeding. If, after such good faith consultation, the Government and the Non-Federal Sponsor cannot agree as to an appropriate amount, then the Non-Federal Sponsor may use the amount set forth in its appraisal as the estimate of just compensation for the purpose of instituting the eminent domain proceeding.

c. For lands, easements, or rights-of-way acquired by eminent domain proceedings instituted in accordance with sub-paragraph B.3. of this Article, fair market value shall be either the amount of the court award for the real property interests taken, to the extent the Government determined such interests are required for the construction, operation, and maintenance of the Project, or the amount of any stipulated settlement or portion thereof that the Government approves in writing.

4. Incidental Costs. For lands, easements, or rights-of-way acquired by the Non-Federal Sponsor within a five year period preceding the effective date of this Agreement, or at any time after the effective date of this Agreement, the value of the interest shall include the documented incidental costs of acquiring the interest, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such incidental costs shall include, but not necessarily be limited to, closing and title costs, appraisal costs, survey

costs, attorney's fees, plat maps, and mapping costs, as well as the actual amounts expended for payment of any Public Law 91-646 relocation assistance benefits provided in accordance with Article III.E. of this Agreement.

C. After consultation with the Non-Federal Sponsor, the Government shall determine the value of relocations in accordance with the provisions of this paragraph.

1. For a relocation other than a highway, the value shall be only that portion of relocation costs that the Government determines is necessary to provide a functionally equivalent facility, reduced by depreciation, as applicable, and by the salvage value of any removed items.

2. For a relocation of a highway, the value shall be only that portion of relocation costs that would be necessary to accomplish the relocation in accordance with the design standard that the State of Arizona would apply under similar conditions of geography and traffic load, reduced by the salvage value of any removed items.

3. Relocation costs shall include, but not necessarily be limited to, actual costs of performing the relocation; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with performance of the relocation, but shall not include any costs due to betterments, as determined by the Government, nor any additional cost of using new material when suitable used material is available. Relocation costs shall be subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

4. Crediting for relocations performed within the Authorized Project boundaries is subject to satisfactory compliance with applicable federal labor laws covering non-Federal construction, including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq) and the Copeland Anti-Kickback Act (40 USC 276c). Crediting may be withheld, in whole or in part, as a result of the Non-Federal Sponsor's failure to comply with its obligations under these laws.

D. The value of the improvements made to lands, easements, and rights-of-way for the proper disposal of dredged or excavated material shall be the costs of the improvements, as determined by the Government, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs. Such costs shall include, but not necessarily be limited to, actual costs of providing the improvements; planning, engineering and design costs; supervision and administration costs; and documented incidental costs associated with providing the improvements, but shall not include any costs due to betterments, as determined by the Government.

ARTICLE V -PROJECT COORDINATION TEAM

A. To provide for consistent and effective communication, the Non-Federal Sponsor and the Government, not later than 30 days after the effective date of this Agreement, shall

appoint named senior representatives to a Project Coordination Team. Thereafter, the Project Coordination Team shall meet regularly until the end of the period of construction. The Government's Project Manager and a counterpart named by the Non-Federal Sponsor shall co-chair the Project Coordination Team.

B. The Government's Project Manager and the Non-Federal Sponsor's counterpart shall keep the Project Coordination Team informed of the progress of construction and of significant pending issues and actions, and shall seek the views of the Project Coordination Team on matters that the Project Coordination Team generally oversees.

C. Until the end of the period of construction, the Project Coordination Team shall generally oversee the Project, including issues related to design; plans and specifications; scheduling; real property and relocation requirements; real property acquisition; contract awards and modifications; contract costs; the application of and compliance with the Davis-Bacon Act, Contract Work Hours and Safety Standards Act and the Copeland Anti-Kickback Act for relocations and non-Federal [{"Proposed Work"}] the Government's cost projections; Credit Agreement Work; final inspection of the entire Project or functional portions of the Project; requirements of the monitoring; implementation of any adaptive management changes; preparation of the proposed OMRR&R Manual; anticipated requirements and needed capabilities for performance of operation, maintenance, repair, replacement, and rehabilitation of the Project; and other related matters. This oversight shall be consistent with a project management plan developed by the Government after consultation with the Non-Federal Sponsor.

D. The Project Coordination Team may make recommendations that it deems warranted to the District Engineer on matters that the Project Coordination Team generally oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider the recommendations of the Project Coordination Team. The Government, having the legal authority and responsibility for construction of the Project, has the discretion to accept, reject, or modify the Project Coordination Team's recommendations.

E. The costs of participation in the Project Coordination Team shall be included in total project costs and shared in accordance with the provisions of this Agreement.

ARTICLE VI -METHOD OF PAYMENT

A. The Government shall maintain current records of contributions provided by the parties and current projections of total project costs, of total project ecosystem restoration costs, of total project recreation costs, of credits for Credit Agreement Work to be afforded in accordance with Articles II.D., and II.E. of this Agreement, and costs due to betterments. By July 1 of each year and at least quarterly thereafter until the end of the period of construction, the Government shall provide the Non-Federal Sponsor with a report setting forth all contributions provided to date and the current projections of total project costs, total project ecosystem restoration costs, total project recreation costs, credits for Credit Agreement Work to be afforded in accordance with Articles II.D., and II.E. of this

Agreement, and total costs due to betterments; of the maximum amount of total project costs determined in accordance with Article XIX of this Agreement; of the components of total project costs; of each party's share of total project costs, total project ecosystem recreation costs, and total project recreation costs; of the Non-Federal Sponsor's total cash contributions required in accordance with Articles II.B., II.D., II.E., and II.F. of this Agreement; of the non-Federal proportionate share; and of the funds the Government projects to be required from the Non-Federal Sponsor for the upcoming fiscal year. On the effective date of this Agreement, total project costs are projected to be ~~\$90,800,000.00~~ \$7,330,000, total project ecosystem restoration costs are estimated to be ~~\$86,582,000~~ \$6,530,000, total project recreation costs are estimated to be ~~\$4,218,000~~ \$800,000, the Non-Federal Sponsor's cash contribution required under Article II.D. of this Agreement is estimated to be ~~\$26,416,155~~ \$2,285,500, and the Non-Federal Sponsor's cash contribution required under Article II.E. of this Agreement is projected to be ~~\$1,952,454~~ \$400,000. The amount of credit for the Credit Agreement Work to be afforded against the Non-Federal Sponsor's required contribution towards total project ecosystem restoration costs in accordance with Article II.D.2. is projected to be ~~\$24,446,000~~ \$1,500,000 and the amount of credit for the Credit Agreement Work to be afforded against the Non-Federal Sponsor's required contribution towards total project recreation costs in accordance with Article II.E.2. of this Agreement is projected to be \$0. Such amounts are estimates subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Non-Federal Sponsor.

B. The Non-Federal Sponsor shall provide the cash contribution required under Articles II.D. and II.E. of this Agreement in accordance with the provisions of this paragraph.

1. Not less than 30 calendar days prior to the scheduled date for issuance of the solicitation for the first construction contract, the Government shall notify the Non-Federal Sponsor in writing of such scheduled date and the funds the Government, after consideration of any credit afforded pursuant to Article II.D. or Article II.E. of this Agreement, determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for construction through the first fiscal year of construction, including the non-Federal proportionate share of financial obligations for construction incurred prior to the commencement of the period of construction. Not later than such scheduled date, the Non-Federal Sponsor shall provide the Government with the full amount of the required funds by delivering a check payable to "FAO, USAED, Los Angeles" to the District Engineer or verifying to the satisfaction of the Government that the Non-Federal Sponsor has deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Non-Federal Sponsor or presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. For the second and subsequent fiscal years of construction, the Government shall notify the Non-Federal Sponsor in writing, no later than 60 calendar days prior to the beginning of that fiscal year, of the funds the Government, after consideration

of any credit afforded pursuant to Article II.D. or Article II.E. of this Agreement, determines to be required from the Non-Federal Sponsor to meet the non-Federal proportionate share of projected financial obligations for construction for that fiscal year. No later than 30 calendar days prior to the beginning of the fiscal year, the Non-Federal Sponsor shall make the full amount of the required funds for that fiscal year available to the Government through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

3. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover: (a) the non-Federal proportionate share of financial obligations for construction incurred prior to the commencement of the period of construction; and (b) the non-Federal proportionate share of financial obligations for construction as they are incurred during the period of construction.

4. If at any time during the period of construction the Government, after consideration of any credit afforded pursuant to Article II.D. or Article II.E. of this Agreement, determines that additional funds will be needed from the Non-Federal Sponsor to cover the non-Federal proportionate share of projected financial obligations for construction for the current fiscal year, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required, and provide an explanation of why additional funds are required, and the Non-Federal Sponsor, no later than 60 calendar days from receipt of such notice, shall make the additional required funds available through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

C. In advance of the Government incurring any financial obligation associated with additional work under Article II.B. or II.F. of this Agreement, the Non-Federal Sponsor shall provide the Government with the full amount of the funds required to pay for such additional work through any of the payment mechanisms specified in Article VI.B.1. of this Agreement. The Government shall draw from the funds provided by the Non-Federal Sponsor such sums as the Government deems necessary to cover the Government's financial obligations for such additional work as they are incurred. In the event the Government determines that the Non-Federal Sponsor must provide additional funds to meet its cash contribution, the Government shall notify the Non-Federal Sponsor in writing of the additional funds required and provide an explanation of why additional funds are required. Within 30 calendar days thereafter, the Non-Federal Sponsor shall provide the Government with the full amount of the additional required funds through any of the payment mechanisms specified in Article VI.B.1. of this Agreement.

D. Upon completion of the Project or termination of this Agreement, and upon resolution of all relevant claims and appeals, the Government shall conduct a final accounting and furnish the Non-Federal Sponsor with the results of the final accounting. The final accounting shall determine total project costs, total project ecosystem restoration costs, total project recreation costs, credits associated with Credit Agreement Work provided in accordance with Articles II.D. and II.E. of this Agreement, each party's contribution provided thereto, and each party's required share thereof. The final accounting also shall determine costs due to betterments and the Non-Federal Sponsor's contribution provided

pursuant to Article II.B. of this Agreement. Nothing in this paragraph precludes the Government from conducting interim accountings or refunding any excess to the Non-Federal Sponsor determined thereby.

1. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor is less than its required share of total project ecosystem restoration costs and total project recreation costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, as well as credits associated with the Credit Agreement Work provided in accordance with Articles II.D. and II.E. of this Agreement, the Non-Federal Sponsor shall, no later than 90 calendar days after receipt of written notice, make a payment to the Government of whatever sum is required to meet the Non-Federal Sponsor's required share of total project ecosystem restoration costs and total project recreation costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement by delivering a check payable to "FAO, USAED, Los Angeles" to the District Engineer or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

2. In the event the final accounting shows that the total contribution provided by the Non-Federal Sponsor exceeds its required share of total project ecosystem restoration costs and total project recreation costs plus costs due to any betterments provided in accordance with Article II.B. of this Agreement, as well as credits associated with the Credit Agreement Work provided in accordance with Articles II.D. and II.E. of this Agreement, the Government shall, subject to the availability of funds, refund the excess to the Non-Federal Sponsor no later than 90 calendar days after the final accounting is complete. In the event existing funds are not available to refund the excess to the Non-Federal Sponsor, the Government shall seek such appropriations as are necessary to make the refund.

ARTICLE VII -DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay percent 50 of any costs for the services provided by such a third party as such costs are incurred. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

ARTICLE VIII - OPERATION, MAINTENANCE, REPAIR, REPLACEMENT, AND REHABILITATION (OMRR&R)

A. Upon notification in accordance with Article II.C. of this Agreement and for so long as the Project remains authorized, the Non-Federal Sponsor shall operate, maintain, repair, replace, and rehabilitate the entire Project or the functional portion of the Project, and maintain the hydraulic integrity of the system, along with any required long-term dredged or

excavated material disposal areas, at no cost to the Government, in a manner compatible with the Project's authorized purposes and in accordance with applicable Federal and State laws as provided in Article XI of this Agreement and specific directions prescribed by the Government in the OMRR&R Manual and any subsequent amendments thereto.

B. The Non-Federal Sponsor hereby gives the Government a right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor owns or controls for access to the Project for the purpose of inspection and, if necessary, for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. If an inspection shows that the Non-Federal Sponsor for any reason is failing to perform its obligations under this Agreement, the Government shall send a written notice describing the non-performance to the Non-Federal Sponsor. If, after 30 calendar days from receipt of notice, the Non-Federal Sponsor continues to fail to perform, then the Government shall have the right to enter, at reasonable times and in a reasonable manner, upon property that the Non-Federal Sponsor owns or controls for access to the Project for the purpose of completing, operating, maintaining, repairing, replacing, or rehabilitating the Project. No completion, operation, maintenance, repair, replacement, or rehabilitation by the Government shall operate to relieve the Non-Federal Sponsor of responsibility to meet the Non-Federal Sponsor's obligations as set forth in this Agreement, or to preclude the Government from pursuing any other remedy at law or equity to ensure faithful performance pursuant to this Agreement.

ARTICLE IX -INDEMNIFICATION

The Non-Federal Sponsor shall hold and save the Government free from all damages arising from the related to the construction, operation, maintenance, repair, replacement, and rehabilitation of the Project, including the Credit Agreement Work, and any Project-related betterments, except for damages due to the fault or negligence of the Government or its contractors.

ARTICLE X -MAINTENANCE OF RECORDS AND AUDIT

A. Not later than 60 calendar days after the effective date of this Agreement, the Government and the Non-Federal Sponsor shall develop procedures for keeping books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Non-Federal Sponsor shall maintain such books, records, documents, and other evidence in accordance with these procedures and for a minimum of three years after the period of construction and resolution of all relevant claims arising therefrom. To the extent permitted under applicable Federal laws and regulations, the Government and the Non-Federal Sponsor shall each allow the other to inspect such books, documents, records, and other evidence.

B. Pursuant to 32 C.F.R. Section 33.26, the Non-Federal Sponsor is responsible for complying with the Single Audit Act of 1984, 31 U.S.C. Sections 7501-7507, as

implemented by Office of Management and Budget (OMB) Circular No. A-133 and Department of Defense Directive 7600.10. Upon request of the Non-Federal Sponsor and to the extent permitted under applicable Federal laws and regulations, the Government shall provide to the Non-Federal Sponsor and independent auditors any information necessary to enable an audit of the Non-Federal Sponsor's activities under this Agreement. The costs of any non-Federal audits performed in accordance with this paragraph shall be allocated in accordance with the provisions of OMB Circulars A-87 and A-133, and such costs as are allocated to the Project shall be included in total project costs and shared in accordance with the provisions of this Agreement.

C. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the Non-Federal Sponsor is required to conduct under the Single Audit Act. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits performed in accordance with this paragraph shall be included in total project costs and shared in accordance with the provisions of this Agreement.

ARTICLE XI -FEDERAL AND STATE LAWS

In the exercise of their respective rights and obligations under this Agreement, the Non-Federal Sponsor and the Government agree to comply with all applicable Federal and State laws and regulations, including, but not limited to, Section 601 of the Civil Rights Act of 1964, Public Law 88-352 (42 U.S.C. 2000d), and Department of Defense Directive 5500.11 issued pursuant thereto, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army". The Non-Federal Sponsor is also required to comply with all applicable federal labor standards requirements including, but not limited to the Davis-Bacon Act (40 USC 276a et seq), the Contract Work Hours and Safety Standards Act (40 USC 327 et seq) and the Copeland Anti-Kickback Act (40 USC 276c).

ARTICLE XII -RELATIONSHIP OF PARTIES

A. In the exercise of their respective rights and obligations under this Agreement, the Government and the Non-Federal Sponsor each act in an independent capacity, and neither is to be considered the officer, agent, or employee of the other.

B. In the exercise of its rights and obligations under this Agreement, neither party shall provide, without the consent of the other party, any contractor with a release that waives or purports to waive any rights such other party may have to seek relief or redress against such contractor either pursuant to any cause of action that such other party may have or for violation of any law.

ARTICLE XIII -OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

ARTICLE XIV -TERMINATION OR SUSPENSION

A. If at any time the Non-Federal Sponsor fails to fulfill its obligations under Article II.B., II.D., II.E., II.F., VI, or XVIII.C. of this Agreement, the Assistant Secretary of the Army (Civil Works) shall terminate this Agreement or suspend future performance under this Agreement unless he determines that continuation of work on the Project is in the interest of the United States or is necessary in order to satisfy agreements with any other non-Federal interests in connection with the Project.

B. If the Government fails to receive annual appropriations in amounts sufficient to meet Project expenditures for the then-current or upcoming fiscal year, the Government shall so notify the Non-Federal Sponsor in writing, and 60 calendar days thereafter either party may elect without penalty to terminate this Agreement or to suspend future performance under this Agreement. In the event that either party elects to suspend future performance under this Agreement pursuant to this paragraph, such suspension shall remain in effect until such time as the Government receives sufficient appropriations or until either the Government or the Non-Federal Sponsor elects to terminate this Agreement.

C. In the event that either party elects to terminate this Agreement pursuant to this Article or Article XV of this Agreement, both parties shall conclude their activities relating to the Project and proceed to a final accounting in accordance with Article VI.D. of this Agreement.

D. Any termination of this Agreement or suspension of future performance under this Agreement in accordance with this Article or Article XV of this Agreement shall not relieve the parties of liability for any obligation previously incurred. Any delinquent payment owed by the Non-Federal Sponsor shall be charged interest at a rate, to be determined by the Secretary of the Treasury, equal to 150 per centum of the average bond equivalent rate of the 13-week Treasury bills auctioned immediately prior to the date on which such payment became delinquent, or auctioned immediately prior to the beginning of each additional 3-month period if the period of delinquency exceeds 3 months.

ARTICLE XV - HAZARDOUS SUBSTANCES

A. After execution of this Agreement and upon direction by the District Engineer, the Non-Federal Sponsor shall perform, or cause to be performed, any investigations for hazardous substances that the Government or the Non-Federal Sponsor determines to be necessary to identify the existence and extent of any hazardous substances regulated under the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), 42 U.S.C. Sections 9601-9675, that may exist in, on, or under lands, easements, and rights-of-way that the Government determines, pursuant to Article III of this

Agreement, to be required for the construction, operation, and maintenance of the Project. However, for lands that the Government determines to be subject to the navigation servitude, only the Government shall perform such investigations unless the District Engineer provides the Non-Federal Sponsor with prior specific written direction, in which case the Non-Federal Sponsor shall perform such investigations in accordance with such written direction. All actual costs incurred by the Non-Federal Sponsor for such investigations for hazardous substances shall be included in total project costs and shared in accordance with the provisions of this Agreement, subject to an audit in accordance with Article X.C. of this Agreement to determine reasonableness, allocability, and allowability of costs.

B. In the event it is discovered through any investigation for hazardous substances or other means that hazardous substances regulated under CERCLA exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the construction, operation, and maintenance of the Project, the Non-Federal Sponsor and the Government shall provide prompt written notice to each other, and the Non-Federal Sponsor shall not proceed with the acquisition of the real property interests until both parties agree that the Non-Federal Sponsor should proceed.

C. The Government and the Non-Federal Sponsor shall determine whether to initiate construction of the Project, or, if already in construction, whether to continue with work on the Project, suspend future performance under this Agreement, or terminate this Agreement for the convenience of the Government, in any case where hazardous substances regulated under CERCLA are found to exist in, on, or under any lands, easements, or rights-of-way that the Government determines, pursuant to Article III of this Agreement, to be required for the construction, operation, and maintenance of the Project. Should the Government and the Non-Federal Sponsor determine to initiate or continue with construction after considering any liability that may arise under CERCLA, the Non-Federal Sponsor shall be responsible, as between the Government and the Non-Federal Sponsor, for the costs of clean-up and response, to include the costs of any studies and investigations necessary to determine an appropriate response to the contamination. The Non-Federal Sponsor shall perform, at no cost to the Government, any treatment of the groundwater, provided by the Non-Federal Sponsor for the Project, which the Government determines to be required under CERCLA. Such costs shall not be considered a part of total project costs. In the event the Non-Federal Sponsor fails to provide any funds necessary to pay for clean up and response costs or to otherwise discharge the Non-Federal Sponsor's responsibilities under this paragraph upon direction by the Government, the Government may, in its sole discretion, either terminate this Agreement for the convenience of the Government, suspend future performance under this Agreement, or continue work on the Project.

D. The Non-Federal Sponsor and the Government shall consult with each other in accordance with Article V of this Agreement in an effort to ensure that responsible parties bear any necessary clean up and response costs as defined in CERCLA. Any decision made pursuant to paragraph C. of this Article shall not relieve any third party from any liability that may arise under CERCLA.

E. As between the Government and the Non-Federal Sponsor, the Non-Federal Sponsor shall be considered the operator of the Project for purposes of CERCLA liability. To the maximum extent practicable, the Non-Federal Sponsor shall operate, maintain, repair, replace, and rehabilitate the Project in a manner that will not cause liability to arise under CERCLA.

ARTICLE XVI -NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Non-Federal Sponsor:

Assistant City Manager
City of ~~Phoenix~~ Tempe
~~200 West Washington Street, Room 1200~~
P.O. Box 5002
31 East Fifth Street
~~Phoenix~~ Tempe, Arizona 85003280-1611

If to the Government:

Department of the Army
Corps of Engineers
Los Angeles District
ATTN: CESPL-PM-C
P.O. Box 532711
Los Angeles, California 90053-2325

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

ARTICLE XVII -CONFIDENTIALITY

To the extent permitted by the laws governing each party, the parties agree to maintain the confidentiality of exchanged information when requested to do so by the providing party.

ARTICLE XVIII - HISTORIC PRESERVATION

A. The costs of identification, survey and evaluation of historic properties attributable to the ecosystem restoration features shall be included in total project ecosystem restoration costs and shared in accordance with the provisions of this Agreement.

B. The costs of identification, survey and evaluation of historic properties attributable to the recreation features shall be included in total project recreation costs and shared in accordance with the provisions of this Agreement.

C. As specified in Section 7(a) of Public Law 93-291 (16 U.S.C. Section 469c(a)), the costs of mitigation and data recovery activities associated with historic preservation shall be borne entirely by the Government and shall not be included in total project costs, up to the statutory limit of one percent of the total amount authorized to be appropriated for the Project.

D. The Government shall not incur costs for mitigation and data recovery that exceed the statutory one percent limit specified in paragraph C. of this Article unless and until the Assistant Secretary of the Army (Civil Works) has waived that limit in accordance with Section 208(3) of Public Law 96-515 (16 U.S.C. Section 469c-2(3)). Any costs of mitigation and data recovery that exceed the one percent limit shall be included in total project ecosystem restoration costs or total project recreation costs, as applicable, and shared in accordance with the provisions of this Agreement.

ARTICLE XIX -SECTION 902 PROJECT COST LIMITS

The Non-Federal Sponsor has reviewed the provisions set forth in Section 902 of Public Law 99-662, as amended, and understands that Section 902 establishes the maximum amount of total project costs for the Authorized Project. Notwithstanding any other provision of this Agreement, the Government shall not make a new Project financial obligation, make a Project expenditure, or afford credit toward total project costs for the value of any contribution provided by the Non-Federal Sponsor, if such obligation, expenditure, or credit would result in total project costs, together with such obligations, expenditures, credits, and contributions for other elements of the Authorized Project, exceeding this maximum amount, unless otherwise authorized by law. On the effective date of this Agreement, this maximum amount is estimated to be \$113,840,000.00, as calculated in accordance with ER 1105-2-100 using October 1, 2000 price levels and allowances for projected future inflation. The Government shall adjust this maximum amount in accordance with Section 902 of Public Law 99-662, as amended.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the Deputy Assistant Secretary of the Army (Management and Budget), Office of the Assistant Secretary of the Army (Civil Works).

DRAFT

DEPARTMENT OF THE ARMY

CITY OF PHOENIX,
a municipal corporation,
Frank Fairbanks, City Manager

BY: _____
Claudia L. Tomblom
Deputy Assistant Secretary of the Army
(Management and Budget)
Office of the Assistant Secretary of the Army
(Civil Works)

BY: _____
Sheryl Sculley
Assistant City Manager
City of Tempe

DATE: _____

DATE: _____

ATTEST: _____
Vicky Miel, City Clerk

DATE: _____

CERTIFICATE OF AUTHORITY

I, William F. Bock, do hereby certify that I am the principal legal officer of the ~~City of Phoenix~~ City of Tempe, that the ~~City of Phoenix~~ City of Tempe is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army and the ~~City of Phoenix~~ City of Tempe in connection with the Rio Salado (Salt River), Phoenix and Tempe, Arizona, and to pay damages in accordance with the terms of this Agreement, if necessary, in the event of the failure to perform, as required by Section 221 of Public Law 91-611 (42 U.S.C. Section 1962d-5b), and that the persons who have executed this Agreement on behalf of the ~~City of Phoenix~~ City of Tempe have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this
_____ day of _____ 20____.

~~William F. Bock~~
~~City of Phoenix~~
~~Chief, Counsel~~
City of Tempe
City Attorney

CERTIFICATION REGARDING LOBBYING

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Sheryl Seulley
Assistant City Manager
City of Phoenix Tempe, Arizona

DATE: _____